election win. If you win in a squeaker, perhaps those legislators would be more responsive than the ones who win by a landslide." Tr. V-118 (Hooper). It is normal human nature for candidates to respond differently to constituents: there is nothing corrupt about this reality.

D. The public perceives Vermont as clean.

David Wilson, whose legislative committee testimony the State favorably cites, Sorrell Br. 2-3, expressed that "the link between a contribution and an outcome in Vermont . . . [has] not yet morally crossed the line where, again, we have the types of problems that I think we've all been reading in the newspapers that exist in other states and certainly in Washington." Ex. II, E-511-12.

Alice Bassett, cited for the allegation that the influence of money helped defeat a bottle bill, Sorrell Br. 2, said in that testimony that "My feeling is having been in the legislature for ten years, that Vermont's lawmakers are – it's a very clean state. I don't think much – many shenanigans go on. In fact, very, very few. I think my pitch for campaign finance reform is more an example to other states where there are many, many problems. I think a good, strong campaign finance reform bill would do a lot to set an example to other states." Ex. II, E-0425.

Neil Randall, another witness cited by the State, when asked if he thought the general public in Vermont has some concern over contributions, stated that he did not see "any case" of cynicism in Vermont, but that he would have a "personal concern" about a contribution from a single contributor that financed a high percentage of his campaign. Tr. IV-258-59. It is true that large contributions can pose the risk of real or apparent corruption, but far from true that meager $200-400 donations pose the same risk.

In fact, Vermonters do not seem to desire the extreme measures of Act 64. William Meub, gubernatorial candidate at the time of trial, testified regarding the people's

perception in Vermont that Act 64 "is clearly perceived as the kind of overregulation and dampening effect, and people have told me to do whatever I can to fight this legislation. So, when they know what it is, they're opposed to it. I haven't found anybody in any group when I have mentioned it, and I have asked for a show of hands, what do people think of it, I haven't found anybody who supports it." Tr. IV-72.

II. The Contribution Limits Are Too Low to Survive Constitutional Scrutiny.

The State claims that "it is simply too late in the day to claim that fears of actual and perceived corruption from excessive contributions are unfounded." Sorrell Br. 32. Petitioners wholeheartedly agree. It is *excessive* contributions that can pose the risk of corruption, but Vermont's original $1,000 per election contribution limits were not excessive. However, Vermont's new contribution limits are so "laughably low" that no risk of corruption could reasonably be perceived, as explained above. But they are also unconstitutional because they are too low to allow candidates to mount effective campaigns.

The State seeks to justify its contribution limits based on their effect on the "average" campaign. Sorrell Br. 40 ("Contribution limits appropriately are to be assessed on their impact across the broad spectrum of candidates."). However, "[t]he average of past expenditures is calculated by including legislative elections that were not seriously contested or perhaps not contested at all – elections in which little communication took place and little was spent." P.A. 236 (Winter, J., dissenting). Any meaningful assessment of the effect of these contribution limits are on those candidates who actually mounted some sort of campaign, particularly competitive ones.

Thus, Plaintiffs' expert Bensen specifically chose to analyze the races that were contested in any meaningful sense, using the $500 minimum required for reporting as

the basis. In the senate races he studied, those who were not required to report were uncontested or only lightly contested. Tr. III-37. There are races where campaigns do not make a difference to the outcome of a race. The State, however, misplaced its focus in analyzing the limits' effects on even uncontested races, which are irrelevant in determining whether contribution limits allow candidates to amass the resources necessary for effective advocacy, the test set out by this Court.

In addition, the State cites the percentage of contributions affected by the limits, rather than the amount of funds. Sorrell Br. 39 (10% of contributions received affected). Since the issue is whether the limits could have a "severe impact on political dialogue," *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), the focus must be the total amount of campaign *funds* that candidates would lose, not the percentage of contributions lost.

III. The State Has Failed to Prove That Its Purported Compelling Interests Justify Limiting Candidates From Spending Money on Their Own Campaigns.

A. The State has failed to prove that preventing real or apparent corruption justifies the expenditure limits here.

Respondents seek to transform the interest in preventing corruption posed by large contributions into an interest supporting expenditure limits. Sorrell Br. 22 ("spending limits directly counter political corruption and its appearance"); VPIRG Br. 6 ("*Buckley* embraced" the anti-corruption interest). However, this Court only "embraced" that interest as to contribution limits, and specifically rejected the interest for expenditure limits. Moreover, *Buckley* held that any "interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations." 424 U.S. at 55. As a

result, "[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56.

The State concedes as much, asserting that spending limits deter corruption by explaining that corruption includes the "use of *donations*," "the wishes of large *contributors*," and "favors that may be given in return for generous *support*," all references to alleged corruption stemming from *contributions*, *not* expenditures. Sorrell Br. 21 (citations omitted) (emphasis added). Thus, the real claim is the dreaded "arms race," where candidates and officials "fearing their opponents' war chests and concerned about being outspent . . . typically grant monied interests *excessive* portions of their limited time." Sorrell Br. 23-24 (emphasis added). The record, however, does not support this contention.

The record, when it does refer to any specific amounts of time fundraising, actually points to brief periods. For instance, Sen. Ready testified to spending an "afternoon" fundraising. Tr. IX-151 ("That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door."); *see also* Tr. IX-167 (Sen. Ready implying that she would "have lunch with or . . . meet with on a Saturday morning . . . [or] spend half of my son's soccer game talking to about their business" with some constituents).

Donald Hooper, cited at VPIRG Br. 17 n.16, indicated that under the prior contribution limits he would spend evenings "hustling campaign money." Tr. V-119. However, in his 1994 run for Vermont secretary of state, he had only 68 contributors who gave over $100. Ex. VI, E-1952-82. Even if he spent one hour per contributor, that would amount to less than 70 hours for his whole statewide campaign, certainly not an "inordinate" amount of time with these contributors.

Finally, the State claims that spending limits will

"relieve the pressure to afford special interest groups undue access and influence." Sorrell Br. 18. Respondents have failed to prove how spending limits will have any effect whatsoever on the giving of "special interest groups." Rather, it is likely that Vermont's spending limits, along with the draconian related expenditure provision, will cause candidates to rely *more* heavily on bundled contributions. Candidates will be reluctant to spend one dime of their meager allocated budget on fundraising costs and thus will be eager to accept the low-cost bundled contributions from "special interests."

Furthermore, *Buckley* specifically addressed "bundling" favorably. The Court, in upholding contribution limits, reasoned that the limits focus on the problem of large contributions while leaving persons free to continue to support candidates, albeit in a limited way. *Buckley*, 424 U.S. at 28. This preserved "the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents." *Id.* at 29 n.31. Thus, this Court viewed citizens' ability to band together to accentuate their contributions as a positive, not a negative.

B. The interest in incumbent time-protection is not proven.

Even if one sets aside the explicit incumbent-protection nature of this claimed interest, the demands of fundraising by incumbents have not been proven to be "inordinate." And, if it were true, as the State claims and the court below found, that "the demands of seeking campaign dollars *often* force officials and candidates to engage in fundraising rather than attending to their public duties," Sorrell Br. 12 (emphasis added), then there would be ample proof of such specific instances. However, there is not a single example of any incumbent having neglected one of their official duties as a result.

Furthermore, since this claimed interest is essentially

that challengers should be limited to the fundraising time that is convenient for incumbents to do, there needs to be evidence from incumbents on how much time they have available, aside from campaigning and performance of their official duties, for fundraising and how much could be raised during this time. There is no such evidence.

C. The interest in electoral competition has not been demonstrated to support mandatory expenditure limits.

Vermont's spending limits would not promote electoral competition as Respondents contend. Instead, the limits would devastate electoral competition by depriving challengers of funds they need to overcome the advantages of incumbency. As State expert Gross acknowledged, "most research which looks at the effect of spending on the outcome of elections indicate that on a dollar per dollar basis, challengers receive greater benefits from spending than incumbents do." Tr. X-81; *see also* Tr. III-163; Tr. IV-172.

Gross nonetheless thought this impact on challengers could be overcome under some circumstances because, "[i]n some ways, incumbents have a lot more to lose by spending limits simply because, particularly at the congressional level, they tend to have so much more money than challengers . . . if you have $800,000 and your opponent has $550,000, if you impose a $500,000 limit, you have more to lose." Tr. X-84.

However, in Vermont challengers often outspend incumbents so that challengers have more to lose in absolute dollars by spending limits than do incumbents. In Vermont house races, the average spent by house non-incumbents exceeded that spent by incumbents in each of the three election cycles before trial. Ex. III, E-991. Similarly, three incumbent statewide candidates were outspent by their challengers in 1998, Ex. III, E-987-88, and 5 of the 6 highest spenders in the last two campaigns

for senate from Chittenden County have been challengers. Ex. IV, E-1305-06.[2]

Thus, the record demonstrates that Vermont's expenditures limits will not only *not* promote electoral competition; they will devastate it.

IV. The Spending Limits Are Not Narrowly Tailored.

The State comments that "the district court specifically rejected the testimony offered by Plaintiffs that one needed to spend nearly $1 million to run an effective campaign for governor or $500,000 for any other statewide campaign in Vermont," calling those claims 'wholly unreasonable.'" Sorrell Br. 9. However, this Court reviews constitutional claims *de novo* and is not bound by the district court's findings.[3] Thus, this Court must independently examine the facts and the record demonstrates that the expenditure limits here are much too low.

The record clearly supports that these amounts are necessary for effective statewide campaigns. First, Kathy

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[2]Moreover, the small reduction in the expenditure limits for incumbent candidates does not alleviate this problem of incumbent advantage. "[T]here's no possible depreciation rate that I have found or anybody else has found that would be large enough to make that small 15 percent or ten percent reduction sufficient to offset this – this huge amount of reputation that the incumbent has already relative to the challenger." Tr. III-170 (Dr. Lott).

[3]This Court requires that "the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). Specifically, and as the Second Circuit's opinion below recognized, "the District Court's legal conclusions regarding the campaign finance reform legislation are subject to *de novo* review." P.A. 111a. This is especially true in the First Amendment context. *See Bose Corp. V. Consumers Union*, 466 U.S. 485, 501 (1984); *Sullivan*, 376 U.S. at 284-86.

Summers, campaign manager for gubernatorial candidate Ruth Dwyer, testified that Dwyer would need between $600,000 and $800,000 in her race. Tr. IV-81; VRSC Br. 19, 40, 42. Second, spending in the last three election cycles have proven that the district court's judgment was wrong. In the 2004 Vermont gubernatorial race, Jim Douglas spent $681,662 and Peter Clavelle spent $502,537. *See* Randall Br. Appendix. In 2002, Douglas spent $1.1 million and Doug Racine spent $723,907. *Id.* In 2000, Howard Dean spent $946,443 and Ruth Dwyer spent $899,581. *Id.* Third, even in 1998, two years before trial, Dean spent $657,065, more than twice the limits. *Id.* Clearly Vermont's statewide expenditure limits are woefully inadequate.

Further, the State claims that the expenditure limits for legislative candidates are adequate, since spending in House races were "less than the Act 64 spending limits *on average*," VPIRG Br. 27 (emphasis added), and since Senate "*average* spending" was less than the limits "in all types of districts save for single-member districts." *Id.* at 28. While *average* spending of *all* legislative candidates is an improper measure of the effect of these limits on candidate campaigns, spending since the district court's decision has proven it wrong. House *average* spending was $2,528 in 2000, $1,998 in 2002, and $2,883 in 2004 and Senate *average* spending in *all* races was $14,458 in 2000, $11,114 in 2002, and $12,463 in 2004. The Institute on Money in State Politics, *2000 State Election Overview* 5, *2002 State Elections Overview* 4, *2004 State Elections Overview* 4, available at http://followthemoney.org/Research.

V. There Is No Evidence That Parties in Vermont Are Corrupt by Acting as Conduits for Contributions from Donors to Candidates.

The only evidence offered by the State that parties "sell access to and influence over candidates and officials

in return for contributions" Sorrell Br. 44, is (1) that political parties in Vermont offer access to candidates at fundraisers, and that lobbyists are present at fundraisers, *id.*, (2) that industry donors give money to parties, *id.* at 44-45, and (3) that one of the Plaintiffs "shifted his donations to his party because of Act 64's limit on candidate contributions." *Id.* at 46. These examples prove nothing and fall far short of the evidence in *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"). That case found that the national Democratic Party used "tallying" to connect donors to candidates and also found that donors were informed that they could contribute to candidates via a contribution to the party. *Id.* at 459.

VI. Approval of These "Laughably" Low Contribution and Expenditure Limits Requires This Court to Accept a Radically Different View of Candidate Campaigns, the Compelling Governmental Interest in Preventing Corruption, and Ultimately the First Amendment Itself.

As the State's amici make clear, this case is not about the peculiarities of Vermont, but about a radical new vision of candidate campaigns, of the compelling governmental interest in preventing corruption, and of the First Amendment itself. This new vision is fundamentally at odds with the record, American experience and any reasonable interpretation of the First Amendment.[4]

A. Candidate Campaigns.

Respondents' favorite term for candidate campaigns is "arms race," Sorrell Br. 7, 17; VPIRG Br. 3, 10, 11, 15, 21, which is an analogy to military armament spending,

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[4]For a concise explanation of and justification for this new vision, *see* Ronald Dworkin, *The Curse of American Politics*, 43 The New York Review of Books (1996),available at http://www.lnybooks.com/articles/1388. For a similarly concise refutation, *see* Brubaker, *supra*.

primarily during the Reagan administration. VPIRG Br. 11 n.8 ("[C]andidates are no more autonomous under *Buckley* in setting levels of campaign spending than were the Soviet Union and the United States in setting levels of military spending during the height of the Cold War."). While a nostalgic phrase for some, *see* Burt Neuborne, *Is Money Different?*, 77 Tex. L. Rev. 1609 (1999), most now recognize that the military buildup during the Reagan administration was not mindless, but a key factor in the collapse of the Soviet Union.

Similarly, candidate fundraising and spending is also not mindless. *See* VPIRG Br. 11 ("[W]hile it is true that high levels of spending are not *necessary* to communicate effectively with voters in Vermont, candidates often raise more than they need because they fear an opponent may raise more.") (emphasis in original). First, the State readily concedes that "[c]ampaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country," Sorrell Br. 8 ("Vermont ranked 49th in spending among gubernatorial campaigns across the country. J.A. 43."); VIPIRG Br. 30 (same); *id.* at 23 n.22 (describing House races as "very low-budget races"), because of "Vermont's small population and intimate campaigning style." *Id.* at 45. Nor do these low cost campaigns generate much fundraising pressure. VPIRG Br. 44 (Under the prior contribution limits, "a sole contributor could fund an average House campaign, and a large portion of a State Senate campaign.").

Second, there are reasons for the rising costs of campaigns, including population growth, the expanding scope of government, the level of competition between the political parties, and the changing means and conditions of effective campaigning. Vermont has experienced this growth, as set forth above, particularly in competition between the political parties, with the Republicans

seizing control of the Vermont House in 2000 and the governorship in 2002 and 2004.

Third, campaign spending is necessary for voter education and has that effect. The American people's political knowledge base is abysmal. Only 33% of adults over 26 know which political party controls their state legislature. National Conference of State Legislatures, *Citizenship: A Challenge for All Generations* 7 (2003), available at http://www.ncsl.org/public/trust/citizenship.pdf. Increased campaign spending produces knowledge increases across the population spectrum. John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Politics 757 (2000); John J. Coleman, *The Distribution of Campaign Spending Benefits across Groups*, 63 J. Politics 916 (2001).

Fourth, challengers need financial resources to overcome the advantages of incumbency and they benefit more than incumbents by such spending. Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 Am. Pol. Science Rev. 469 (1978); Gary C. Jacobson, *Money and Votes Reconsidered: Congressional Elections, 1972-1982*, 47 Pub. Choice 7 (1985); Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 Am. J. Pol. Science 334 (1990).

So "arms race" is "a pejorative method of describing competition over voter persuasion, the very heart of the democratic process," P.A. 281a (Winter, J., dissenting), and "refers to contested elections in which challengers spend resources to run serious campaigns." *Id.* at 247a.

B. The Compelling Governmental Interest in Preventing Corruption.

The compelling governmental interest in preventing corruption is based on this Court's finding that "sometimes *large* contributions will work actual corruption of

our political system," and that there is "a *corresponding* suspicion among voters." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395 (2000) (emphasis added). The State, however, would have this Court reject this formulation, in favor of a much broader one, in two ways: (1) by defining a "large" contribution to be a de minimis one, and (2) by separating perceived corruption from actual corruption.

First, the State claims that the contribution limits here "are directed at amounts considered 'suspiciously large.'" Sorrell Br. 14; *id.* at 9, 38 (same); VPIRG Br. 43 (same). It has already been demonstrated, by a review of the evidence, that there is no evidence that these contribution limits address amounts that are *suspiciously* large. VRSC Br. 8-9. But these contribution limits are not large by any measure. In 1974, Congress adopted the $1,000 per election contribution limits approved in *Buckley*. Adjusted for inflation, this limit would be $3,961.46 in today's dollars, Bureau of Labor Statistics, CPI Inflation Calculator, http://data.bls.gov?cgi-bin/cpicalc.pl (last visited Feb. 20, 2006), or $7,962.92 for the election cycle. This is twenty times larger than Vermont's highest limit. In 1974 dollars, Vermont's highest contribution limit, adjusted to be per election, would be worth $50.48, *id.*, versus *Buckley's* approved limit of $1,000. $50.46 would have been considered small in 1974, not, by any measure, large.

Second, the State claims that its contribution limits may be justified by perceived corruption, absent actual corruption from contributions at these low limits. Sorrell Br. 33, VPIRG Br. 41. But it is well established that there is an underlying suspicion about politicians in America that precedes our founding and continues to today. The American National Election Studies, *Are Governmental Officials Crooked 1958-2004,* http://www.umich.edu/~nes/nesguide/ toptable/tab5a_4.htm (last visited Feb. 20,

2006) (finding that from 1958-2004 24% to 35% of the American people believed that "quite a few" politicians were crooked, and only 26% to 10% thought that "hardly any" were). If perceived corruption were enough, government would have unbridled power to regulate campaigns.

C. The First Amendment.

Finally, Respondents ask this Court to reverse decades of its jurisprudence and find that the expenditure limits are not content-based regulations of speech, and are thus subject to lower scrutiny. VPIRG Br. 36-39. In *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002), this Court found that limiting candidates' speech to certain pre-approved subjects is content-based. Since it is only expenditures "for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates," 17 V.S.A. § 2801(3), that are subject to the expenditure limits, "by any commonsense understanding of the term," they are content-based. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429(1993). "Indeed, were . . . expenditure limitation[s] unrelated to the content of expression, there would have been no perceived need for Congress [in enacting the expenditure limits struck in *Buckley*] to 'equalize the relative ability' of interested individuals to influence elections." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994) (quoting *Buckley*, 424 U.S. 1, 48 (1976)).

VII. The Presumption of Coordination Is Unconstitutional.

The State argues that Section 2809(d)'s mandatory rebuttable presumption of coordination is constitutional because, under Vermont law, the presumption merely shifts the burden of *production*, not the ultimate burden of *persuasion*. Sorrell Br. 48. Even if this is true, Section 2809(d) is still unconstitutional, because this Court's cases teach that mandatory rebuttable presumptions

violate due process even if the ultimate burden of persuasion remains with the State.

Vermont Evidence Rule 301(c)(1) provides that in cases of civil presumptions, the jury is required to find the existence of the presumed fact, "[i]f the evidence of the basic fact is such that no reasonable juror could find the nonexistence of that fact and if the party against whom the presumption operates has not met the production burden imposed on him" by the civil presumption. This Court's cases, however, hold that, in the criminal law context, shifting the burden of production through the use of a mandatory presumption violates Due Process. *See County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157-58 and n.16 (1979). Similarly, the First Amendment require that "speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall*, 357 U.S. 513, 529 (1958); *see also Weinberger v. Salfi*, 422 U.S. 749, 785 (1975) (stating that civil presumptions affecting "important liberties cognizable under the Constitution" are accorded the same Due Process scrutiny as criminal law presumptions). The presumption here violates this requirement.

Conclusion

This Court should remand with direction to award judgment to Plaintiffs with respect to 17 V.S.A Sections 2805(a), 2805a, 2809(d) and for further proceedings consistent with this Court's decision.[5]

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[5]The State is not entitled to a reversal of the decision below remanding the expenditure limits to the district court to determine if they are narrowly tailored, Sorrell Br. 50, because this was not raised in their Conditional Cross-Petition.

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NEIL RANDALL, ET AL.,

Petitioners,

—v.—

WILLIAM H. SORRELL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Historical Campaign Finance Database,
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Office of the Secretary of State, Deborah L. Markowitz, Guide to Vermont's Campaign Finance Law (Sept. 2005) http://vermont-elections.org/elections1/2005CFGuide 1129rev.pdf 19, 20

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ARGUMENT

I. ACT 64'S EXPENDITURE LIMITS VIOLATE THE FIRST AMENDMENT

A. Buckley Properly Rejected Expenditure Limits As an Unconstitutional Restraint on Core Political Speech

Despite Respondents' best efforts to argue otherwise, Act 64's expenditure limits cannot be upheld without rejecting the core holding of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).[1] This Court should reject that invitation for three reasons. First, *Buckley's* recognition that expenditure limits directly restrict core political speech that lies at the heart of the First Amendment was correct. Second, Respondents' principal arguments largely mirror arguments that were considered and rejected in *Buckley*. Third, respondents' effort broadly to redefine the state's asserted interest in dictating the appropriate amount of political speech directly conflicts with core First Amendment values.

Throughout their briefs, Respondents describe Act 64 as if it were only about money and not about speech. Nothing could be further from the truth. Under Act 64's broad definitions, a candidate who has reached her expenditure limit is prohibited from any manner of campaigning. She cannot spend another dollar to carry her message forward or to respond to criticisms leveled by opponents, the opposing political party, advocacy groups or the media. The restriction applies to both cash and in-kind expenditures. Thus, for example, once a candidate has reached the statutory spending limit, Act 64

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[1] Unless otherwise indicated, the term "Respondents" refers to both the State Respondents and the Intervenor Respondents.

prohibits the candidate from even driving across town to a political rally.

This direct restraint on speech contravenes not only the holding, but the reasoning, of *Buckley*. It is not up to the government to decide how much speech is necessary for candidates and voters in a political campaign. That is a decision for the candidates and voters to make in our constitutional democracy. Indeed, the prohibition on election-day editorials invalidated in *Mills v. Alabama*, 384 U.S. 214 (1966), represents a "lesser intrusion on constitutional freedom" than a limitation on the amount a candidate can spend during an entire campaign. *Buckley*, 424 U.S. at 50.

Act 64 does something this Court has "never allowed": the Act "prohibit[s] candidates from communicating relevant information to voters during an election." *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002). By focusing on candidate speech, moreover, Act 64 has two perverse results. It deprives voters from hearing the most important voice in any political campaign — namely, the voice of the candidate. And, as a result, it magnifies the importance of so-called special interest spending, further undermining the state's asserted interest in limiting the influence of such groups on the electoral process. *Buckley*, 424 U.S. at 45.

In addition, expenditure limits inevitably blur the line between discussions of issues by candidates, particularly incumbents, and election speech. Candidates are intimately tied to public issues involving legislative proposals and government actions. *See, e.g. Buckley*, 424 U.S. at 42. Although candidates campaign on these issues, they are no less entitled to engage in the public discussion of those issues simply because they are also running for office. *Id.* at 52-53. "[T]he notion that the special context

of electioneering justifies an *abridgement* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *Republican Party of Minn.*, 536 U.S. at 781. There are, as well, serious definitional issues in determining what speech by incumbents will count as an expense under Act 64. *See* P.A. 214a-218a.[2]

Respondents' failure fully to answer these fundamental criticisms of Act 64 is fatal under the exacting scrutiny required by *Buckley*, 424 U.S. at 44. The Court's cases involving speaker-based and content-based restrictions on candidate and electoral speech consistently apply the same exacting standard. *See, e.g.*, *Republican Party of Minn.*, 536 U.S. at 774-775; *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 785 (1978). Act 64 cannot meet this standard because it is not supported by a compelling state interest, and it is not narrowly tailored. For Act 64's spending limits to meet this exacting standard,

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[2] Respondents' argument that spending limits will not further entrench incumbents is simply not credible. Indeed, Vermont understood this would be the case, which is why slightly reduced limits for incumbents were adopted. The inadequacy of this fix is discussed in our opening brief at 16 n.11. More fundamentally, "everyone knows this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage." *McConnell v. FEC*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part); *see also Buckley*, 424 U.S. at 56-57 ("[E]qualization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.").

Respondents "must demonstrate that it does not unnecessarily circumscribe protected expression." *Republican Party of Minn.*, 536 U.S. at 775 (citation, internal quotation marks, and alteration omitted). Act 64 fails this test because it unnecessarily restrains core political speech in a way that is barely tailored to serve the interests purportedly advanced by the Act.[3]

Buckley remains grounded in core First Amendment principles that this Court has never disavowed; indeed, they are the very principles that undergird our democracy. "[T]he concept that the Government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. Thus, in discussing the limitation on independent expenditures, the *Buckley* Court rejected the argument that either the State's interest in preventing corruption, or the ancillary interest in equalizing the relative ability of individuals and groups to influence the outcome of elections, could justify the burden on core First Amendment expression. Act 64 runs afoul of this principle by attempting to introduce financial parity into

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[3] The Intervenor Respondents urge the Court to abandon the exacting scrutiny required by *Buckley*, and to uphold the expenditure limits under the analysis applicable to content-neutral regulation of speech applied in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). This argument underscores a fundamental misconception that the Court addressed directly in *Buckley*. Discussing its decision in *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court explained that "[t]he decibel restriction upheld in *Kovacs* limited the *manner* of operating a sound truck, but not the *extent* of its proper use." *Buckley*, 424 U.S. at 18 n.17. By contrast, the Court explained, "[FECA's] dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information." *Id.* The same distinction applies to Act 64 because it operates as a direct restraint on speech.

the election process in a way that directly restrains speech. If Vermont wants to accomplish this goal, it can do so by providing a meaningful public funding alternative that does not suppress speech.

Turning next to the expenditure limits imposed on candidates from personal or family resources, the *Buckley* Court explained:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

424 U.S. at 52-53.

As the Court stated in summarizing its position, "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. That principle is not limited to self-funded candidates, and cannot be reconciled with the expenditure limits imposed by Act 64.

Finally, the *Buckley* Court noted that "[t]he major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions," not the aggregate financial resources available to the candidate's campaign. *Id.* at 55-57. The Court then concluded that the interest in alleviating the corrupting influence of candidate dependence on large

contributions is fully served by contribution limits and disclosure provisions. *Id.* at 56-57.

> Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.

424 U.S. at 56 (footnote omitted).

Despite this unambiguous holding, Respondents nonetheless argue that Act 64's spending limits can withstand the exacting scrutiny required by *Buckley*. To do this, Respondents grossly exaggerate the presence and appearance of corruption in Vermont and urge this Court to extend the definition of corruption in a way that moves beyond the rationale that is *Buckley*'s very foundation. That effort is both constitutionally and factually flawed.

B. Act 64's Expenditure Limits Are Not Supported by Any Compelling State Interest

1. *Expenditure Limits Are Neither a Necessary Nor Appropriate Response to Respondents' Overstated Claims of Political Corruption in Vermont*

Respondents grossly exaggerate the presence of "corruption" in Vermont. Respondent's grim view of the Vermont political scene would be unrecognizable to many Vermonters. It is not supported by the record, nor does it make intuitive common sense. Vermont is a small state with the second smallest legislative districts in the